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Recommended Citation

Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DePaul L. Rev. 51 (1998)

Available at: <https://via.library.depaul.edu/law-review/vol48/iss1/3>

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NATURAL LAW AND SAME-SEX MARRIAGE

Mark Strasser*

INTRODUCTION

Hawaii is on the verge of recognizing same-sex marriages.¹ Nonetheless, some Natural Law Theorists argue that same-sex marriages cannot be true marriages and thus cannot be recognized by any state. These arguments are unpersuasive for two reasons. First, they undermine each other in that they as readily establish that the state should recognize same-sex marriages as that it should not. Second, they at least implicitly involve a misunderstanding of the relation between Natural Law as a moral system and American domestic relations jurisprudence. Even if Natural Law had a determinative content which specified that same-sex marriages were morally impermissible, this would not establish what states must or even should do, because the (alleged) dictates of Natural Law are ignored in other areas of domestic relations jurisprudence regarding who may marry whom and regarding the conditions under which marriages are recognized as legally valid. Indeed, not only does current domestic relations law reject the Natural Law rationales, but the individual and state interests implicated in marriage which have already been recognized in the law strongly support the recognition of same-sex unions.

Part I of this article discusses Natural Law both as a legal theory and as a moral theory.² In neither form will the dictates of the system be completely determinate. Thus, some Natural Law *moral* theories will yield dictates which directly contradict those of other Natural Law *moral* theories, and some Natural Law *legal* theories will yield dictates which directly contradict those of other Natural Law *legal* theories. Ironically, some of the rationales purportedly establishing that Natural Law as a moral theory prohibits same-sex marriage as readily es-

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1. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1965 (1997) ("We can confidently predict that Hawaii will recognize same-sex marriages."); Victoria Slind-Flor, *Same-Sex Case Poses Many Questions*, NAT'L L.J., Dec. 16, 1996, at A8 (discussing that given the composition of the Hawaii Supreme Court, it is likely that the lower court decision will be affirmed).

2. See *infra* Part I.

tablish that such marriages are morally permissible as that they are morally impermissible. Part II discusses the important state and individual interests that are implicated in marriage, concluding that both state and individual interests would be promoted rather than undermined by the legal recognition of same-sex unions.³ Part III concludes that same-sex marriages should be recognized for both moral and legal reasons and, further, that the kinds of specious arguments offered to prohibit the legal recognition of such unions should at the very least serve as a cautionary tale for those who trumpet Natural Law as a kind of bulwark against the unfair treatment of minorities.⁴

I. NATURAL LAW AND DETERMINATIVE CONTENT

Part of the difficulty in deciding whether Natural Law supports, permits, or prohibits same-sex marriage is that Natural Law might refer to any number of legal and moral positions.⁵ Even focusing solely on Natural Law as a moral theory, one would still find that the term might refer to a number of different, potentially conflicting theories. Ironically, an examination of some of the particular Natural Law theories which ostensibly establish the impermissibility of same-sex marriage reveals that the claimed clarity and consistency of these theories does not exist. Further, the dictates of the systems as easily support as undermine the permissibility if not obligatoriness of the state's recognizing same-sex marriages.

A. *The Legal Theory Versus the Moral Theory*

Natural Law might refer to either a legal or a moral theory.⁶ Natural Law as a legal theory (Natural Law_L) posits that there is a necessary connection between law and morality.⁷ Such a position might helpfully be contrasted with legal positivism, which denies that necessary connection.⁸ However, Natural Law_L Theorists are not wedded to any particular moral theory. Thus, one such theorist might be a

3. See *infra* Part II.

4. See *infra* Part III.

5. See *infra* notes 6-19 and accompanying text.

6. Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2394 (1992) ("[N]atural law refers both to a moral theory and a legal theory, neither of which bears any obvious logical relationship to the other.").

7. See *id.* at 2395 (stating Natural Law as a legal theory "takes its shape from its explicit opposition to legal positivism: the legal positivist claims that no necessary connection exists between law and morality; the natural law legal theorist denies that a sharp separation of these concepts is possible.").

8. *Id.*

utilitarian, another might be a deontologist, and yet another might subscribe to her particular society's conventional morality.⁹

Natural Law_L Theorists do not only disagree about which moral system is correct; they also disagree about the *nature* of the required connection between law and morality. For example, while claiming that law must have its own inner morality,¹⁰ some Natural Law_L Theorists merely mean that the law must meet certain *procedural* requirements.¹¹ Others claim that the *content* of the law must itself be in accord with certain moral requirements and that laws which fail to meet that standard are not in fact laws.¹²

Natural Law as a moral theory (Natural Law_M) makes claims about the nature of morality, e.g., that moral principles are objectively valid and are discoverable by reason.¹³ Yet, a variety of moral theorists might claim that the moral system to which they subscribe meets those conditions.¹⁴ For example, a utilitarian might claim that the "'greatest happiness principle,'" which holds that "actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness,"¹⁵ is objectively true and discoverable by reason.¹⁶ Other theorists might make similar claims about the discoverability and objective validity of their own moral systems.¹⁷

An individual might be a Natural Law Moral and Legal Theorist (Natural Law Theorist_{ML}). However, such a theorist might have any number of positions. For example, her position may be that her moral

9. See *id.* at 2400 ("To be a natural law legal theorist seems only to require that one determine legal validity by reference, not only to the positivist test of pedigree, but also by reference to morality—including conventional morality if that turns out to be the true theory of morality.").

10. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-45 (1958) (discussing the inner morality of law).

11. See LON L. FULLER, *THE MORALITY OF LAW* 39 (2d ed. 1969) (discussing eight ways to fail to make a law); see also Daniel E. Wueste, *Fuller's Processual Philosophy of Law*, 71 CORNELL L. REV. 1205, 1212-13 (1986) (book review) (discussing Fuller's view on the inner morality of law).

12. See *infra* note 18 and accompanying text.

13. See Soper, *supra* note 6, at 2394 ("[O]ne of the characteristics that makes a moral theory a natural law theory: namely, the insistence that moral principles are objectively valid and discoverable by reason."); see also Lloyd L. Weinreb, *The Moral Point of View*, in NATURAL LAW, LIBERALISM, AND MORALITY 195, 196 (Robert P. George ed., 1996) (describing the common element of Natural Law theories as "simply the assertion of some moral principle (or set of principles) as certain and dispositive of the matter at hand").

14. See *infra* notes 15-19 and accompanying text.

15. JOHN STUART MILL, *UTILITARIANISM* 8 (George Sher ed., Hackett Publ'g 1979) (1861).

16. See *id.* at 34-40 (offering a kind of "proof" for the principle of utility).

17. See, e.g., ALAN GEWIRTH, *REASON AND MORALITY* 47 (1978) ("[E]very agent, on pain of self-contradiction, must accept a certain supreme principle of morality [which Gewirth will offer]. In virtue of this, the principle will emerge as categorically obligatory and as having a strictly rational justification.").

theory is true and objectively discoverable by reason and that laws which require or even permit immoral practices are not in fact laws,¹⁸ or that morality is objective but also that law must merely have certain procedural protections in order to qualify as law.¹⁹

B. *The Natural Law Position on Same-Sex Marriage*

Various theorists claim that Natural Law precludes same-sex marriages.²⁰ Yet, the validity of such a claim cannot be established until that claim has been analyzed more fully. For example, it would be important to know whether this was a claim about Natural Law as a legal theory or as a moral theory. Since Natural Law_L addresses the necessary connection between law and morality but does not specify which moral theory must be true,²¹ the claim that Natural Law prohibits same-sex marriages is presumably, at the very least, a claim that Natural Law_M condemns such marriages. There might be an *additional* implicit assertion at work here, namely, that because Natural Law_M (allegedly) condemns such marriages,²² and because Natural Law_L posits a necessary connection between law and morality, the law therefore must not recognize such marriages. However, that additional assertion would require further justification even were the first claim accurate²³ and thus can only be examined after the first claim has been discussed.

It would not be surprising if a Natural Law_M Theorist claimed that same-sex marriages were morally impermissible. Natural Law has been cited to establish the moral permissibility *and* impermissibility of

18. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596-97 (1958) (discussing Austin's reading of Blackstone to the effect that a law which conflicts with Divine Law is not a law).

19. See *supra* notes 10-11 and accompanying text (describing Lon Fuller's procedural Natural Law position).

20. See Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 482-83 (1994) (suggesting that a court could conclude that same-sex marriages are contrary to Natural Law); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1446 (1997) ("[T]here are ample sources for the argument that gay and lesbian relationships contravene natural law.").

21. See Soper, *supra* note 6, at 2395 ("Legal theory, in short, seems to address a question about the connection between two concepts, law and morality. Whatever the upshot of that conceptual inquiry, the question of which moral theory is true seems open to independent argument and determination.").

22. See sources cited *supra* note 20.

23. Thus, the question would still be whether the law would have to reflect the *content* of the moral system, see *supra* note 18 and accompanying text, or instead might merely have to reflect certain procedural requirements, see *supra* notes 10-11 and accompanying text.

a variety of practices.²⁴ For example, it has been described both as permitting and as prohibiting interracial marriages,²⁵ and both as permitting and as prohibiting nonprocreative marital sex.²⁶ One would expect the same lack of consensus with respect to same-sex unions, especially where some of the issues dividing Natural Law_M Theorists about the moral permissibility or impermissibility of interracial marriages or nonprocreative sex will also divide theorists on this issue.

That there are debates among Natural Law_M Theorists about what is permitted and prohibited is itself significant, since the claimed obviousness and certainty of the moral dictates of the system are undermined if reasonable individuals can come to opposite conclusions about the morality of particular practices.²⁷ Thus, if it is claimed that Natural Law is a preferable alternative to other systems because it offers certainty while other theories do not²⁸ and if Natural Law is itself indeterminate, then the claims about its superiority in this respect are at best unpersuasive.

The more compelling difficulty for the Natural Law_M Theorist, however, is not merely that the claimed obviousness and certainty of the system are in fact illusory, since such a criticism might be made about a variety of systems.²⁹ Rather, it is that some of the justifications for

24. See *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 351 (1969) (Black, J., dissenting) (suggesting that Natural Law "standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional"); see also LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE 2* (1987). Weinreb states:

Natural law persisted, the more easily because there was nothing to limit its specific content, and was used to identify whatever was deemed fundamental—that is, certain and non-negotiable. Hobbes and Locke each referred to the premises of his system as dictates of nature, although the principles so described could not have been less alike.

Id.; see also Kathryn Dean Kendell, *Principles and Prejudice: Lesbian and Gay Civil Marriage and the Realization of Equality*, 22 J. CONTEMP. L. 81, 92 (1996) ("Natural law can be asserted for virtually any proposition, on any side of an issue.").

25. Compare *Naim v. Naim*, 87 S.E.2d 749, 752 (Va. 1955), in which the Supreme Court of Virginia cited with approval *State v. Gibson*, 36 Ind. 389 (1871), in which the Supreme Court of Indiana had suggested that Natural Law forbids interracial marriage, with *State v. Ross*, 76 N.C. 242 (1877), in which the Supreme Court of North Carolina suggested that Natural Law did not forbid such marriages.

26. See *infra* notes 78-107 and accompanying text (discussing different Natural Law positions with respect to the conditions, if any, under which nonprocreative sexual relations are permissible).

27. See *supra* note 24 (discussing Natural Law's lack of definitive content).

28. This is suggested by Charles Rice. See Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 556 (1989) (suggesting that Natural Law provides the only basis for declaring "absolute, inalienable rights against the State").

29. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 45-49 (1980) (discussing the claim that utility comparisons cannot be made); see also MARK STRASSER, *THE MORAL PHILOSOPHY OF JOHN STUART MILL: TOWARD MODIFICATIONS OF CONTEMPORARY UTILITARIANISM* 54-78 (1991) (discussing whether utilitarian calculations are possible).

the permissibility of interracial marriage and nonprocreative sex undermine the purported justifications for the impermissibility of same-sex marriage. Indeed, some commentators suggest that Natural Law *supports* same-sex marriage.³⁰

C. Interracial Marriage

Natural Law has long been cited to explain why interracial marriages are impermissible.³¹ Further, those claims were not only made in the 1700s and 1800s—in the 1950s and 1960s, courts were making clear their belief that God does not permit individuals of different races to marry.³² Even more recently, courts have asserted the religious view that interracial marriage is contrary to God's will.³³

The difficulties posed for the Natural Law_M Theorist by the disagreement about whether interracial marriages are morally permissible cannot be easily dismissed. Such theorists must explain how individuals could have believed (and, perhaps, still believe) that Natural Law precludes such marriages. Of course, a theorist might suggest that such individuals are correct. However, he must then explain how those citing Natural Law to establish the permissibility of such marriages could be wrong. In any event, he would risk the charge that Natural Law as currently interpreted is a mask for bigotry and thus should not be incorporated within the civil law.

A Natural Law_M Theorist might suggest that some of the dictates of Natural Law are unclear and are subject to disagreement among reasonable people,³⁴ or perhaps that Natural Law at one time prohibited

30. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 97 (1996) (discussing how the unitive goal of marriage should induce Natural Law Theorists to support same-sex marriage).

31. See *State v. Gibson*, 36 Ind. 389, 404-05 (1871) (noting state must be allowed to prohibit interracial marriage to effect God's wishes); *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878) (asserting God and nature forbid interracial marriage); Rodney Patton, Student Work, *Queerly Unconstitutional?: South Carolina Bans Same-Sex Marriage*, 48 S.C. L. REV. 685, 703-04 (1997) ("South Carolina, like many other states, once prohibited interracial marriages because such unions were believed to violate natural law."); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 114 (1993) (discussing individuals "claiming that interracial marriage was against the will of God").

32. See *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955). The Supreme Court of Appeals of Virginia made clear its belief that God prohibited interracial unions. See *id.* at 752.

In *Loving v. Virginia*, 388 U.S. 1, 3 (1967), the United States Supreme Court discussed a lower court's opinion that God did not intend that the races marry.

33. See, e.g., *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974). The University subscribed to certain precepts, including that "God intended segregation of the races and that the Scriptures forbid interracial marriage." *Id.* at 735.

34. See Peter R. MacLeod, Note, *Latin Legal Writing: An Inquiry into the Use of Latin in the Modern Legal World*, 39 B.C. L. REV. 235, 241 (1997) ("Natural law is a complicated and unclear doctrine.").

interracial marriage but no longer does.³⁵ However, either of these responses would undermine the constancy and determinacy of the system's dictates³⁶ and would invite the response that same-sex marriage might also be one of those subjects about which reasonable Natural Law_M Theorists might disagree or which once might have been impermissible but now is permissible.

The Natural Law_M Theorist might instead suggest that an individual believing interracial marriage impermissible probably had his or her judgment corrupted in some way. As Francis Hutcheson explained, "When the strain of conversation and popular maxims have long represented certain actions or events as good, and others as evil; we find it difficult to break the association, even after our reason is convinced of the contrary."³⁷ Yet, the same might be said of the reactions of many to same-sex relationships, namely, that the associations inculcated since childhood are affecting the ability to make a correct, unbiased moral judgment.

D. What Does Natural Law Forbid?

When two individuals disagree about what Natural Law_M requires or forbids, there must be some way to settle the disagreement. A theorist who suggests that Natural Law is a system of "rules and principles for the guidance of human conduct" which may be "discovered by the rational intelligence of man"³⁸ will not help resolve the disagreements at issue here, because each of the disagreeing parties would claim to have used reason to discover the permissibility or impermissibility of such marital unions. By the same token, an appeal to revelation is of no help here,³⁹ because either or both of the disagreeing parties might claim to have had his or her understanding enhanced through revelation. Unless some non-question-begging way to resolve

35. See Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1079-80 (1994) ("[R]ules validated by fundamental principle may change with time and societal condition."); Schuyler M. Moore, *A Practitioner's Primer on Natural Law*, 4 S. CAL. INTERDISC. L.J. 455, 459 (1995) ("The most important element of natural law is its capacity to evolve with time as the morals of a culture change.").

36. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 44 (1980) (suggesting that rightness and wrongness depend upon the nature of things). Presumably, on this view, these moral qualities would be unchanging.

37. FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY bk. 1, ch. 1, art. 8, p. 30 (A.M. Kelley 1968) (1755).

38. Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51, 55-56 (1996).

39. See Rice, *supra* note 28, at 560-62 (discussing the need for reason to be aided by revelation).

these disputes is offered, the credibility of the Natural Law claims to clarity and certainty will be severely diminished.

There are additional ways to establish the superiority of one position over another without appealing to reason or revelation. For example, if it could be established that permitting a particular practice would be disastrous, that would seem to be a compelling reason to believe that practice impermissible. However, it should be noted that the mere claim that a particular practice will be disastrous will not make it so.

When courts discussed why interracial marriages were impermissible, they suggested that allowing interracial couples to marry would result in dire consequences.⁴⁰ When Isaac Jones was convicted of having married a woman of a different race, he was "convicted of a crime, not only against the law of Virginia, but against the just sensibilities of her civilization."⁴¹ That conviction was overturned, not because it was believed that there was anything wrong with punishing an individual for marrying outside of his or her race, but because the state could not prove that Isaac Jones and his wife were in fact of different races.⁴²

A different Virginia court had already explained the importance of preventing the races from intermarrying.⁴³ "The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, . . . all require that . . . [the races] should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law."⁴⁴ Not surprisingly, the claimed disastrous consequences of permitting interracial marriages have not materialized—the public morals have not become impure and the advancement of civilization has not been arrested.⁴⁵

Professor John Finnis suggests that the state's endorsement of same-sex relationships would involve "an active threat to the stability

40. See *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 311 (1871) ("A sound philanthropy, looking to the public peace and the happiness of both races, would regard any effort to intermerge the individuality of the races as a calamity full of the saddest and gloomiest portent to the generations that are to come after us.").

41. *Jones v. Commonwealth*, 79 Va. 213, 216 (1884).

42. *Jones v. Commonwealth*, 80 Va. 538, 544-45 (1885).

43. *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878).

44. *Id.*

45. However, some continue to disapprove of interracial marriages. See, e.g., Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531, 549 (1994) (discussing Alabama high school principal who threatened to cancel a prom if students brought dates of a different race).

of existing and future marriages.”⁴⁶ Finnis claims this is true because, for example, doing so allegedly would make nonsense of the view that adultery is *per se* immoral rather than immoral because it may involve deception or the breaking of an agreement.⁴⁷ Finnis suggests that such marriages need not and should not be recognized because the stability of family life is of “fundamental importance”⁴⁸ and because the recognition of same-sex marriages would allegedly threaten that stability. If in fact same-sex marriage is not a threat to the traditional family, as has been suggested in the courts,⁴⁹ then one must wonder how a community could rightly judge that it had a compelling interest in denying same-sex marriages, Finnis’s view notwithstanding.⁵⁰

Perhaps it will be argued that a difficulty in Finnis’s account is the arguably instrumental claim that same-sex marriages will somehow lead to the destruction of the traditional family.⁵¹ Thus, suppose that contention can be shown to be false or that various other practices which are much more likely to lead to the destruction of the family are ignored whereas same-sex marriage, which is much less likely to do so, is prohibited.⁵² In that event, the credibility of the argument against recognizing such marriages would be substantially weakened if not totally undermined. The argument against same-sex unions might seem to be on surer footing were it not arguably based on an empirical claim.⁵³

Natural Law_M Theorists who argue that the recognition of same-sex marriages would have deplorable consequences would seem to have at least two worries: (1) their arguments would seem subject to empirical disconfirmation, and (2) their arguments are strikingly analogous

46. John M. Finnis, *Law, Morality and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1070 (1994).

47. *See id.*

48. *Id.*

49. *See, e.g.,* Baehr v. Miike, No. CIV.91-1394, 1996 WL 694235, at *20 (Haw. Cir. Ct. Dec. 3, 1996).

50. *Cf.* Finnis, *supra* note 46, at 1070 (arguing that same-sex marriage threatens the stability of the institution of marriage).

51. *See* Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 101 (1996) (suggesting that Finnis’s “claim that a particular action by government will have the effect of undermining companionate marriage is, at root, empirical and instrumental” and thus will be subject to disconfirmation). Finnis claims that marriages also have intrinsic worth. *See* John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in NATURAL LAW, LIBERALISM, AND MORALITY 1, 14 (Robert P. George ed., 1996).

52. *See* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 442 (S.D. Ohio 1994) (stating that heterosexual males are far more responsible for the breakdown of the family than gays), *rev’d*, 54 F.3d 261 (6th Cir. 1995), *cert. granted, judgment vacated*, 518 U.S. 1001 (1996), *on remand to* 128 F.3d 289 (6th Cir. 1997).

53. For a discussion of an intrinsic worth critique of same-sex marriage, see *infra* notes 108-26 and accompanying text.

to arguments previously offered against permitting interracial couples to marry. Indeed, these theorists' reliance on implausible empirical claims to justify policies which do not seem to have a rational basis only supports the suspicion that the suggested policies are a product of prejudicial attitudes.⁵⁴

In a related context, Justice Blackmun suggested both that existing disabilities imposed on lesbians, gays, and bisexuals often do not in fact promote their purported goals and that the impositions of those disabilities have often been invidiously motivated.⁵⁵ For example, he suggested that disagreements about which sexual acts are morally permissible will not induce people to abandon morality or to think better of murder, cruelty, or dishonesty,⁵⁶ thus rejecting the asserted claim that protecting sodomy within the right to privacy would promote rampant immorality. He further suggested that efforts to punish sodomy are the product of bias rather than legitimate social policy and that a "State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."⁵⁷ He thereby implied not only that legal prohibitions imposed on lesbians, bisexuals, and gays are comparable to those that have been imposed on the basis of race, but also that both types of prohibitions often stem from illicit intentions and motivations.

Sometimes, it is not the historical moral teachings themselves but the method of applying those precepts that suggests invidious treatment. Thus, arguments based on historical religious and moral teachings may be used selectively to burden gays, lesbians, and bisexuals, but not others, even though the traditions themselves made no such distinction. For example, the Supreme Court of Kentucky asked whether a "society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment."⁵⁸ In striking down the state's sodomy law on state constitutional grounds, the court rejected the notion that there was a "a rational basis for declaring this one type of sexual immorality so destructive of family values as to merit criminal punishment," pointing out that "other acts of sexual immorality . . . were likewise forbidden by the same religious and

54. Cf. Finnis, *supra* note 51, at 12 (discussing how silence about why gays and lesbians should be disadvantaged may raise the suspicion that such disabilities are "grounded in subrational motivations"). Yet, the same inference might be drawn when obviously specious arguments are offered.

55. See *Bowers v. Hardwick*, 478 U.S. 186, 211-12 (Blackmun, J., dissenting).

56. *Id.* at 212.

57. *Id.* at 211-12.

58. *Commonwealth v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1993).

traditional heritage of Western civilization but are now decriminalized.”⁵⁹

In *Bowers v. Hardwick*,⁶⁰ the Georgia law at issue did not distinguish between same-sex and opposite-sex sodomy.⁶¹ The *Bowers* majority itself chose to ignore the statutory language and to characterize the issue in terms of same-sex sodomy rather than sodomy in general.⁶² The Court *might* have reached the same result by considering the existing Georgia statute and holding that nonmarital sodomy was not protected by the fundamental right to privacy,⁶³ although equal protection issues might still have been implicated in such an analysis given the state’s refusal to allow same-sex couples to marry.⁶⁴ However, the *Bowers* Court took special pains to indicate that it was *not* addressing opposite-sex sodomy,⁶⁵ as if same-sex sodomy was so different that it required a special, wholly different analysis.⁶⁶ When courts offer selective applications of moral teachings and selective interpretations of statutes, they do not inspire confidence in the impartiality or sincerity of those offering the interpretations.

Historically, courts had attempted to justify antiscegenation statutes by suggesting that interracial marriages posed a threat to civilization.⁶⁷ Yet, civilization would seem to be much more at risk by allowing prejudice and bigotry to reign than by allowing same-sex or interracial couples to marry. When concurring in a judgment striking down the state’s antiscegenation statute, a member of the California Supreme Court noted, “Prejudice and intolerance are the cancers of civilization.”⁶⁸ There is no reason to think that prejudice on the

59. *Id.*

60. 478 U.S. 186 (1986).

61. *Id.* at 200 (Blackmun, J., dissenting).

62. *Id.* (suggesting that “the majority has distorted the question this case presents”).

63. See *State v. Santos*, 413 A.2d 58, 68 (R.I. 1980) (finding that the right to privacy does not include nonmarital sodomy).

64. In *Baehr v. Lewin*, 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993), a plurality of the Hawaii Supreme Court held that the state’s same-sex marriage ban violated the Equal Protection Clause of the state constitution, remanding the case to give the state an opportunity to establish its compelling reasons for its facially discriminating on the basis of sex. *Id.* at 68. In *Baehr v. Miike*, No. CIV.91-1394, 1996 WL 694235, at *20 (Haw. Cir. Ct. Dec. 3, 1996), the court held that the state had not met its burden.

65. *Bowers*, 478 U.S. at 190.

66. *Id.* at 200 (Blackmun, J., dissenting) (“Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens.”).

67. See *supra* notes 40-44 and accompanying text.

68. *Perez v. Lippold*, 198 P.2d 17, 32 (Cal. 1948) (Carter, J., concurring).

basis of orientation is any healthier for the body politic than is prejudice on the basis of race.

It would be false to suggest that commentators are not sensitive to the possibility that they will be charged with bias when offering arguments against same-sex marriage which, at the very least, sound strikingly familiar to those previously offered against interracial marriage.⁶⁹ Indeed, commentators sometimes try to explain why laws preventing same-sex marriage are disanalogous to laws which prevented interracial marriage.⁷⁰ For example, Professor Lynn Wardle suggests that such laws are not analogous because the former protect "the basic unit of society—the family," whereas the latter did not,⁷¹ as if supporters of antiscegenation laws would never have argued that those laws aimed to support the family and civilization itself. He further suggests that because it is permissible to criminalize sodomy,⁷² it is also permissible to prevent same-sex marriage.⁷³ Yet, this is exactly the kind of piggybacking argument that was used to justify laws invidiously discriminating on the basis of race.

In *McLaughlin v. Florida*,⁷⁴ the state attempted to justify its law penalizing interracial fornication more heavily than intraracial fornication by suggesting that the fornication statute supported its antiscegenation statute.⁷⁵ The Supreme Court rejected this analysis,⁷⁶ perhaps realizing the difficulties that accepting such an analysis might pose. For example, had Florida's argument been accepted, then as long as there were at least *two* laws, each imposing a (related kind of) disability against one particular group, each law might be thought a reasonable exercise of the police power because it would be viewed as helping the state to enforce the other law.⁷⁷ When either law was

69. See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 21 (charging that "opposition to same-sex marriage is treated as proof of narrow-mindedness, dangerous fundamentalism, or an unprofessional mixing of personal moral or religious preferences and law").

70. See *infra* notes 71-73 and accompanying text.

71. Wardle, *supra* note 69, at 75.

72. *But see supra* notes 60-66 and accompanying text (suggesting that the *Bowers* opinion did not involve an exercise in good faith).

73. See Wardle, *supra* note 69, at 79. *But see* Mark Strasser, *Sodomy, Adultery, and Same-Sex Marriage: On Legal Analysis and Fundamental Interests*, 8 UCLA WOMEN'S L.J. (forthcoming Spring 1999) (suggesting that even were sodomy laws constitutional, this would not preclude recognition of the fundamental right to marry a same-sex partner).

74. 379 U.S. 184 (1964).

75. *Id.* at 195.

76. *Id.*

77. See Mark Strasser, *Family, Definitions, and the Constitution: On the Antiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1019-21 (1991) (discussing the hypocrisy involved in set-

challenged, the state would claim that it was not attempting to act invidiously but instead to bolster its current framework of laws.

Merely because some theorists offer specious distinctions which are strikingly similar to those offered to justify antimiscegenation laws does not imply that no arguments can be offered to prohibit same-sex marriages which were not analogously used to prohibit interracial marriages. Indeed, one obvious possibility might seem to suggest itself, namely, that same-sex couples should not be allowed to marry because they cannot produce a child through their union. Because interracial couples can reproduce through their union whereas no same-sex couples can, this might seem to be an argument against same-sex marriages which would not have been analogously used against interracial unions.

E. Nonprocreational Sex

Commentators may attempt to differentiate former laws prohibiting interracial marriage and current laws prohibiting same-sex marriage by suggesting that there is an important difference between the two types of couples—many interracial couples can have children through their union whereas no same-sex couples can.⁷⁸ However, commentators pointing to this difference are ignoring the historical bases used to justify the “unnaturalness” of interracial unions, since courts would sometimes point to the children of such marriages to justify the prohibition—either by claiming that children of interracial unions might themselves be unable to reproduce⁷⁹ or by claiming that children of interracial unions were “inferior.”⁸⁰ Further, when one considers that St. Augustine even approved of sterile marriages because communion and companionship of the spouses was an additional goal of marriage,⁸¹ one must wonder about the accuracy of the claim that Natural Law requires that individuals be able to procreate through their union if they are to be allowed to marry.

ting up a system of mutually reinforcing invidiously discriminatory laws and claiming such laws reasonable because they reinforced one another).

78. See *infra* notes 83-87 and accompanying text (discussing Finnis's view).

79. See *State v. Jackson*, 80 Mo. 175, 179 (1883) (“[I]f the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites.”).

80. See *Scott v. Georgia*, 39 Ga. 321, 323 (1869); see also Trosino, *supra* note 31, at 101-02 (asserting that “the popular belief that children of interracial marriage were mentally and physically inferior to pure race children” was offered as a justification to prevent interracial marriage).

81. See *ESKRIDGE*, *supra* note 30, at 96-97.

Although discussing with approval Plutarch's comment that intercourse with a sterile spouse is a desirable mark of esteem and affection,⁸² Finnis claims that gay and lesbian relationships "cannot express or do more than is expressed or done if two strangers engage in [sexual] . . . activity to give each other pleasure, or a prostitute gives pleasure to a client in return for money."⁸³ This goes well beyond a claim about the possibility of procreation and instead relies on a theory of expression which very few, if any, theorists would be willing to embrace. Indeed, one wonders whether Finnis himself would embrace it in any context other than the one in which he has offered it.

For example, suppose that Jan has sexual relations with her long-time female partner, Kim. By and in having sexual relations with her partner, Jan means to express her love for her partner and is so understood by Kim. *Notwithstanding Kim's having understood the meaning that Jan had intended to convey*, Finnis would deny that any such expression had occurred. All that Jan allegedly could have expressed to Kim would have been what two strangers could express to each other during anonymous sex or what a prostitute could have expressed while servicing a client.

Finnis argues that same-sex couples cannot marry because their sexual relations cannot be marital in the appropriate sense. "Because their activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the *marital* good . . . [their coupling] can do no more than provide each partner with an individual gratification."⁸⁴ He suggests that sexual acts are not marital unless they have "procreative significance, not necessarily of being intended to generate or capable in the circumstances of generating but at least of being, as human conduct, acts of the reproductive kind."⁸⁵ He thus offers a theory which would explain why the naturally sterile couple may marry.

One difficulty for this theory is in the specification of the relevant "reproductive kind." Were the requirement merely that the spouses make the act as reproductive as much as they "then and there [could],"⁸⁶ there would be no bar to same-sex spouses marrying and having intercourse, since they might indeed fulfill that requirement. The theory offered by Finnis requires that there be a way to differentiate between those kinds of sexual relations which have the possibility

82. See Finnis, *supra* note 51, at 16.

83. *Id.* at 15.

84. Finnis, *supra* note 46, at 1066.

85. *Id.* at 1067.

86. *Id.*

of producing a child and those kinds of sexual relations which do not have such a possibility.⁸⁷

Finnis suggests that individuals may perform an act of the correct kind, even if "some biological condition happens to prevent that unity resulting in generation of a child."⁸⁸ Presumably, by including those who *happen* to be unable to procreate, he means to exclude those who were intentionally sterilized. Yet, it is at best unclear why a particular act would be of the right type if performed by individuals *involuntarily* sterile but not if by individuals *voluntarily* sterile. In each case, the individuals involved would intend to have sexual relations, knowing that they could not produce a child through their lovemaking.

For example, suppose that Bill had a permanent and irrevocable vasectomy because he decided that he never wanted to father any children. Suppose further that he then met and married Caroline. Their sexual relations would not be unitive in the appropriate sense. Bill does not merely happen to be unable to father a child but instead has intentionally brought about that condition. It would hardly be persuasive to argue that contraceptive sex is not unitive for married couples,⁸⁹ but that noncontraceptive sex is, even for those couples who use no contraception because one of the partners had voluntarily been sterilized.

Suppose, however, that Bill now sincerely regrets his decision to have had a vasectomy. He would undo the procedure if he could but he has been reliably informed by his physician that this particular procedure cannot be undone. Perhaps the relations between Bill and Carol would now be unitive in the appropriate sense because he sincerely regrets his decision,⁹⁰ even though he is now no more able to father a child than he would have been had he never changed his mind about the desirability of his having obtained a vasectomy.⁹¹ Regardless of whether regretful Bill can engage in the appropriate unitive relations, it would be quite difficult to offer a non-question-begging way to distinguish between regretful Bill, nonregretful Bill, and someone naturally sterile with respect to whether he could engage in the appropriate unitive relations, although Finnis must be able to do so if his position is to be tenable.

87. See *supra* text accompanying note 85 (differentiating based upon whether the acts were of the "reproductive kind").

88. Finnis, *supra* note 46, at 1068.

89. See Finnis, *supra* note 51, at 16.

90. I owe this suggestion to Mary Becker.

91. I owe this example to Mary Coombs.

There are a variety of approaches that might be taken if the relevant issue is how to morally evaluate individuals who are naturally sterile versus individuals who intentionally and voluntarily bring about their own sterility. Following John Stuart Mill, one could distinguish between acts and characters and argue that the characters of the individuals who intentionally became sterilized would deserve a different moral evaluation than would the characters of the individuals who did nothing to bring about their sterility.⁹² Yet, such an approach would not be helpful in this context, because it might not be clear what moral evaluation should be given to those individuals who intentionally became sterilized.⁹³ Further, this evaluation would be even more difficult to make in a case in which the individual now sincerely regretted his former decision to become sterilized. Perhaps he is no longer blameworthy (or praiseworthy) because of that sincere regret. Or, perhaps he is less (or more) blameworthy (or praiseworthy) because he should have foreseen that he might change his mind but nonetheless had a vasectomy anyway.

The important issue for Finnis's theory is not moral blameworthiness or praiseworthiness *per se* but rather the proper way to individuate actions.⁹⁴ Finnis must show how the acts (or behaviors) of the different marital couples can be distinguished so that some are of the "right" kind but others are not, even though the couples' current sexual behaviors are identical. The theory of act-individuation which is required in Finnis's account is much more complicated than might first be realized.

Indeed, it may be even more complicated than the above suggests. Consider two lesbians in a long-term, committed relationship who sometimes make artificial insemination an integral part of their lovemaking. Or, consider two gay men who sometimes make it a part of their lovemaking to produce sperm which is to be used in artificial insemination. The lovemaking of either of these couples might have to be included as being of the "right" kind, because it might in fact result in the production of a child. If their lovemaking were not so classified, assuming that a non-question-begging distinction could somehow be offered, then there would be the surprising result that sexual relations which cannot result in the production of children are

92. See MILL, *supra* note 15, at 18 ("[T]he motive has nothing to do with the morality of the action, though much with the worth of the agent. He who saves a fellow creature from drowning does what is morally right, whether his motive be duty or the hope of being paid for his trouble.").

93. Arguably, the person was praiseworthy for acting responsibly.

94. For a discussion of act-individuation, see MARK P. STRASSER, AGENCY, FREE WILL, AND MORAL RESPONSIBILITY 37-58 (1992).

of the correct reproductive kind⁹⁵ but that sexual relations which can produce children are not.⁹⁶

Finnis does not helpfully explain how this issue should be resolved. He suggests that although biological union between men and women does not result in generation in most circumstances, "it is the behaviour that unites biologically because it is the behaviour which, as behaviour, is *suitable* for generation."⁹⁷ Yet, the behavior of sterilized individuals is not suitable for generation in that it will never result in generation. Further, the same-sex lovemaking in which artificial insemination plays a role is suitable in that it might result in generation. If suitability is not to be defined in terms of reproductive possibility but instead in a different way, e.g., those behaviors with a stamp of moral approval from a particular moral theory, then that should be made explicit and Finnis should not pretend that this has to do with the possibility of reproduction.

Finnis suggests that all "who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments for gratifying the individual 'selves' who have them."⁹⁸ As illustrated above, that claim is false if such a conclusion is not required as long as the act can be reproductive. Yet, even if it was true, one would have to wonder what non-question-begging way is being offered to distinguish between a same-sex couple and a married couple, each incapable of procreating through their union, each viewing themselves as solely intending to gratify each other when having sexual relations, and each viewed by others in the same way. Insofar as actions are grouped into kinds by looking at the conative states of agents or by looking at the reasonably foreseeable consequences of the behavior, it may be quite difficult to distinguish between the actions of these two different couples.⁹⁹

Finnis claims that same-sex partners cannot have "a *common good* that could be actualized and experienced by . . . *bodily union*,"¹⁰⁰ pre-

95. See Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 262, 280 (1995) (suggesting that heterosexual relations which cannot produce children are not appropriately included within the correct kind).

96. Some of the ideas expressed in this section are contained in MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* 54-55 (1997).

97. Finnis, *supra* note 51, at 25-26 n.76 (emphasis added).

98. Finnis, *supra* note 46, at 1070.

99. For different analyses of the connection between the agent's conative states and his or her actions, see generally DONALD DAVIDSON, *Intending*, in *ESSAYS ON ACTIONS AND EVENTS* 83 (1980) and ALVIN I. GOLDMAN, *A THEORY OF HUMAN ACTION* (1970).

100. Finnis, *supra* note 51, at 15.

sumably because the common good involved in an expression of same-sex love does not count as the "right" kind of good or the "right" kind of love. He then argues that because this common good cannot be experienced, a kind of disintegration of self occurs.¹⁰¹ Yet, even if this disintegration occurs, *subjective experience notwithstanding*, he fails to consider that the individuals themselves may feel united in a kind of oneness. Further, Finnis apparently believes that this disintegration will *not* occur in marital relationships, even if one of the parties feels alienated, perhaps because she is only having sexual relations to placate her husband.¹⁰² Thus, the disintegration which is part of Finnis's theory is radically disconnected from the actual experiences of the selves who are allegedly undergoing this disintegration and alienation.

Finnis suggests that a married couple who engages in *coitus interruptus* would be engaging in an impermissible practice,¹⁰³ as presumably would the intentionally sterilized couple when they had sexual relations. An accidentally sterile couple might engage in the "right" kind of activity, even if they were solely seeking sexual gratification, quite consciously and intentionally. Further, the same might be said of a fertile couple who used no protection, did not want a child, and were also solely interested in gratification. Bracketing whether seeking sexual gratification should have the moral taint which Finnis seems to want to ascribe to it,¹⁰⁴ the above moral characterizations seem at the very least noncompelling.

Finnis takes great pains to explain why the naturally sterile person can engage in the appropriately unitive marital act.¹⁰⁵ Presumably, this is because it is no fault of the individual that he or she is unable to reproduce. Suppose that orientation is either genetic or fixed early in childhood so that it, too, is not chosen. The same claims about lack of "fault" might be made here, too.

Perhaps Finnis would point to the following difference between the naturally sterile person and the naturally gay or lesbian person. Although one's orientation would be toward individuals of the same sex, one still could have children if one were to be married to some-

101. *Id.*

102. See Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169, 1180-81 (1996) (discussing reasons that women in marital relationships might have unwanted sex).

103. Finnis, *supra* note 46, at 1068.

104. See Macedo, *supra* note 95, at 281-85 (1995) (questioning Natural Law's "[c]ramped [v]iew" of valuable sexual relations).

105. See Finnis, *supra* note 51, at 15-16; Finnis, *supra* note 46, at 1067-69.

one of the opposite sex.¹⁰⁶ Thus, natural inclinations notwithstanding, one might *choose* an opposite-sex partner. The individual might not be able to love his or her marital partner but nonetheless should choose him or her so that children might be produced or that unitive acts might take place. Not only would this have extremely disintegrating and alienating effects, but this disintegration and alienation would actually be experienced by the selves who had been put into this position. Further, it is unlikely that these would be happy or healthy homes for any of the parties involved, although theorists might argue that one is morally required to give up health and happiness for the possibility that one might be able to engage in appropriately unitive acts.

Consider the individual who loves an opposite-sex, would-be marital partner who is sterile. Should this potentially procreating individual be pressured into choosing a different mate? While the sterile individual might not have chosen his or her condition, the nonsterile individual would be *choosing* to enter into a marriage which could not result in children. Arguably, this person should, just as the lesbian or gay person allegedly should, choose another mate if there is to be a marriage. Further, it will not help that Finnis has offered a way for the nonvoluntarily sterile person to be able to engage in "procreative-like" acts, because the potentially procreating person discussed here would have *chosen* to be with someone who could not procreate.¹⁰⁷ Just as the potentially procreating individual would not be wrong to choose a sterile mate, a gay or lesbian would not be wrong to choose a same-sex partner, Finnis's view notwithstanding.

F. Intrinsic Worth

A different tack might be adopted to justify differing assessments of same-sex and opposite-sex relationships. Professors Robert George and Gerard Bradley offer an intrinsic worth argument to support their Natural Law critique of same-sex marriage.¹⁰⁸ According to their theory, individuals who engage in the appropriate kind of sexual behavior can achieve a basic marital good, "whether or not they are capable of

106. This might require artificial insemination of the husband's sperm, although it is not at all clear that this would be permissible insofar as Finnis's position reflects that of the Catholic Church. See John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 244 (1995) (suggesting that the Church is against "artificial insemination with husband's sperm, and other reproductive techniques that enable married couples to procreate").

107. See Finnis, *supra* note 46, at 1067-68.

108. Finnis shares a similar intrinsic worth argument. See Finnis, *supra* note 51, at 14 (discussing the intrinsic goodness of the marital union).

conceiving children in their acts of genital union.”¹⁰⁹ Asserting that an instrumentalist view “damages the basic good of human integrity,”¹¹⁰ these theorists reject the tradition within Natural Law which asserts that sexual acts are only instrumentally good insofar as they can produce children.¹¹¹ These theorists also seem to reject, at least implicitly, that individuals who intentionally become sterilized will be engaging in an unacceptable practice when having sexual relations.¹¹²

George and Bradley understand that others may not appreciate the intrinsic goodness of the marital practices of which they speak.¹¹³ However, that is not a worry, since “[i]ntrinsic value cannot, strictly speaking, be demonstrated.”¹¹⁴ They further warn that “whatever undermines the sound understanding and practice of marriage in a culture—including ideologies that are hostile to that understanding and practice—makes it difficult for people to grasp the intrinsic value of marriage and marital intercourse.”¹¹⁵ They thus imply that those who are knowledgeable and, perhaps, whose understanding has not been corrupted will have the proper appreciation of the intrinsic value of marriage and of marital intercourse.

George and Bradley do not seem to appreciate the irony of suggesting that cultural practices and ideologies may make it difficult to grasp the intrinsic worth of marriage and family but that they nonetheless *can* appreciate the worth of same-sex relationships and same-sex intercourse. Apparently, they believe that the “knowledge” of the worths of these practices should not be corrupted by an actual experiencing of them and that those who have such experience do not have anything relevant to say.

The point here should not be misunderstood. These theorists are correct to point out that there are difficulties in establishing or appreciating intrinsic worth and value, especially by those who have little acquaintance with the matter at issue due to personal or cultural circumstances.¹¹⁶ Yet, they seem unable to appreciate the implications of such a point, since they themselves may have difficulty in grasping

109. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 301-02 (1995).

110. *Id.* at 305.

111. *Id.* at 304.

112. *See id.* (“[T]he intrinsic point of sex in any marriage, fertile or not, is, in our view, the basic good of marriage itself, considered as a two-in-one-flesh communion of persons that is consummated and actualized by acts of the reproductive type.”).

113. *Id.* at 306-07.

114. *Id.* at 307.

115. George & Bradley, *supra* note 109, at 307.

116. *Id.*

the intrinsic value of same-sex relationships, given the ideologies that are hostile to such an understanding.

John Stuart Mill argued that some pleasures were intrinsically superior to others.¹¹⁷ However, because others, e.g., Jeremy Bentham, claimed that no pleasures were intrinsically superior to any other,¹¹⁸ Mill sought to provide a neutral method to determine which pleasures were intrinsically superior.¹¹⁹ He asked that it be supposed that one of two pleasures

is, by those who are competently acquainted with both, placed so far above the other that they prefer it, even though knowing it to be attended with a greater amount of discontent, and would not resign it for any quantity of the other pleasure which their nature is capable of.¹²⁰

In that case, he suggested that we would be "justified in ascribing to the preferred enjoyment a superiority in quality, so far outweighing quantity as to render it, in comparison, of small account."¹²¹

Mill's approach is helpful to consider in this context. At issue here are claims both about which relationships are superior and about the implications of that superiority. Yet, when one is challenged by a claim that one practice is intrinsically superior to another, it is at best unconvincing to simply reassert that position. Presumably, the other individual will simply reassert the denial of the alleged intrinsic superiority of the practice at issue and no progress will have been achieved. Thus, when George and Bradley claim that the marital relationship is intrinsically superior,¹²² they seem to have no helpful response to someone who challenges that claim.

Perhaps, following Mill, one should see whether those who have familiarity with both same-sex and opposite-sex relationships or practices would universally choose one type over the other. Indeed, one wonders what George and Bradley would say if "knowledgeable" judges chose same-sex over opposite-sex relationships and practices, despite some of the societally imposed, extrinsic costs of doing so.¹²³ Would these theorists suggest that opposite-sex marriages should not be permitted?

117. MILL, *supra* note 15, at 8-9.

118. THE RATIONALE OF REWARD (1825), reprinted in 2 THE WORKS OF JEREMY BENTHAM 253 (John Bowring ed., 1962). Bentham writes, "Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either." *Id.*

119. MILL, *supra* note 15, at 8.

120. *Id.*

121. *Id.* at 8-9.

122. George & Bradley, *supra* note 109, at 305.

123. Some of the points here are discussed in STRASSER, *supra* note 96, at 55-57.

There is no need to actually have such a test, because the point here is not to make an assertion about which practices are intrinsically superior or which practices have intrinsic worth, but to suggest that the intrinsic worth argument is much less compelling than might first appear and as readily supports as undermines recognizing same-sex marriages.¹²⁴ Further, the theorist's argument itself is of the sort that would never be offered in any other marital context. Basically, these theorists are suggesting that because one marriage is intrinsically better than another, the less preferable marriage simply should not be legally recognized. Yet, they would never assert such a claim were same-sex marriages shown to be intrinsically superior. By the same token, were marriages of fertile couples intrinsically superior to marriages of nonfertile couples, these theorists would presumably *never* claim that the latter couples should be prohibited from marrying.

Natural Law Theorists who claim that the law cannot recognize same-sex marriages at best illustrate the difficulties in determining what their theory requires, permits, and prohibits.¹²⁵ The justifications involving extrinsic and intrinsic worth seem better suited to establishing that such marriages must be recognized than that they should not be. Such a result is especially ironic, given that other Natural Law_M theories more straightforwardly support the permissibility of same-sex marriage.¹²⁶ If the theories of Finnis, George, and Bradley are the best examples of Natural Law theories which (allegedly) prohibit same-sex marriage, then perhaps Natural Law_M Theorists should admit that their theories *support* the moral permissibility of same-sex marriage.

II. EXISTING DOMESTIC RELATIONS LAW

Even were it possible to establish that Natural Law_M had a determinate position on the permissibility of same-sex unions, a different issue is whether the law should take account of that position and, if so, how. Numerous state and individual interests are implicated in marriage and those must be considered either instead of or in addition to the Natural Law_M position before one can establish that the state should or should not permit same-sex couples to marry.

124. See generally Becker, *supra* note 102 (arguing that same-sex relationships are morally preferable to opposite-sex relationships).

125. See Philip Soper, *Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law*, 22 CREIGHTON L. REV. 67, 72 (1988) (suggesting that it is not surprising that there is no consensus about what Natural Law dictates).

126. See *supra* note 30 and accompanying text; see also VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY 188 (1998) (suggesting that Natural Law theory is compatible with same-sex marriage).

A. *The Promotion of Morality*

The state has a legitimate interest in promoting morality.¹²⁷ Yet, as suggested above, the correct moral evaluation of same-sex relationships is at the very least a contested issue. A variety of moral theories suggest that such relationships are morally permissible if not praiseworthy.¹²⁸ Thus, even were Natural Law_M clear that same-sex marriages were impermissible, that would not establish that such unions were immoral, since there are a variety of moral systems of which Natural Law_M is but one example.¹²⁹ The state has a legitimate interest in the promotion of morality generally rather than Natural Law_M in particular or, more to the point, a particular version of Natural Law_M.¹³⁰ Thus, even were the Natural Law_M positions outlined above allegedly establishing the impermissibility of same-sex marriage more persuasive,¹³¹ this would not establish that the state's interest in morality would be promoted by incorporating that position into the law.

When individuals discuss what is moral or immoral, they might not have in mind what a particular theory says but instead the majority view of a particular society. Yet, merely because the majority of a particular society happens to believe that a particular practice is immoral does not make it so. For example, those believing interracial marriages immoral are simply wrong, even if in fact they are the majority in a particular community.

Even were there unanimity about which practices were morally permissible or impermissible, it would not follow that the law should reflect those views. As Justice Stevens suggested in a related context, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."¹³² Presumably, at least one

127. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (asserting that the promotion of morality is part of the traditional police power of the state).

128. See Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 966-67 (1991) ("[A]ccording to a variety of theories, homosexual behavior is morally permissible.").

129. See Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 351 (1997) ("[M]erely because Natural Law is a system of morality does not imply that it is the *only* system of morality.").

130. See *supra* note 127.

131. See *supra* notes 20-126 and accompanying text.

132. *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens J., dissenting); see also *Gryczan v. State*, 942 P.2d 112, 125 (Mont. 1997). The Montana Supreme Court asserted:

[I]t does not follow, however, that simply because the legislature has enacted as law what may be a moral choice of the majority, the courts are, thereafter, bound to simply acquiesce. Our Constitution . . . guarantee[s] to all persons, whether in the majority or in a minority, those certain basic freedoms and rights which are set forth in the Declaration of Rights, not the least of which is the right of individual privacy. Regardless

of the points which Justice Stevens had in mind was that there are a variety of individual and state interests which must be considered before a law is enacted or declared constitutional, regardless of the prevailing view about the moral permissibility of the practice at issue.

B. *Implicated Interests in Marriage*

While the state has an interest in promoting morality, it also has a number of other interests which must be considered when marriage laws are at issue. State interests in the recognition and promotion of marriage include the promotion of stability, the limitation of the disorganized breakdown of relations, and the provision of a home for the production and rearing of children.¹³³ All of these interests would be promoted by recognizing same-sex marriages. It should be noted, for example, that same-sex couples are having and raising children, even if those children are not produced through their union.¹³⁴ Indeed, some states recognize both members of same-sex couples as the legal parents of the same child, precisely because this will promote the best interests of that child.¹³⁵ Thus, some commentators' claims notwithstanding, the state's interest in assuring that children will have a healthy, supportive environment in which to thrive militates in favor of the recognition of same-sex marriage rather than against it.¹³⁶ Indeed, the court in *Baehr v. Miike* recognized the good parenting skills of individuals in same-sex relationships.¹³⁷

Just as the state's interests would be promoted by recognizing same-sex marriages, various individual interests would also be promoted by affording that recognition. The Supreme Court has articulated some of the individual interests which are implicated in marriage. Marriages are "expressions of emotional support and public commit-

that majoritarian morality may be expressed in the public policy pronouncements of the legislature, it remains the obligation of the courts—and of this Court in particular—to scrupulously support, protect and defend those rights and liberties guaranteed to all persons under our Constitution.

Id.

133. See Strasser, *supra* note 129, at 361-63 (discussing states' interests in marriage).

134. ESKRIDGE, *supra* note 30, at 110.

135. See *Adoption of Tammy*, 619 N.E.2d 315, 318-21 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397, 398-99 (N.Y. 1995); *Adoptions of B.L.V.P. & E.L.V.B.*, 628 A.2d 1271, 1273-76 (Vt. 1993).

136. For further discussion of the societal interests implicated in recognizing same-sex marriages, see generally Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 976-80 (1995).

137. See *Baehr v. Miike*, No. CIV.91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996) ("Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.").

ment.”¹³⁸ They have spiritual significance and are the precondition to a variety of government benefits.¹³⁹ These interests are implicated whether one is discussing same-sex or opposite-sex couples. Indeed, although the Supreme Court of Hawaii denied that there is a fundamental right to same-sex marriage,¹⁴⁰ the fundamental right to marry arguably should include the right to marry a same-sex partner.¹⁴¹

It might be suggested that individual interests militate *against* recognizing same-sex marriages in that allowing same-sex couples to marry would devalue the worth of marriage in the eyes of some opposite-sex couples, and that this is the reason that same-sex marriages should not be recognized. Yet, the speciousness of such an argument becomes apparent as soon as one considers other contexts in which such a claim might be made. Certainly, such an argument would not be given much weight were it offered to justify the refusal to recognize interracial or interreligious marriages. Yet, individuals might sincerely believe that the value of their marriages had been diminished by the state’s recognizing interracial or interreligious unions.

C. *The Coherence Model*

Some commentators seem to be offering a much different reason to believe that same-sex marriages should not be recognized by the state, namely, that recognizing such unions would allegedly not cohere with other state practices regarding marriage.¹⁴² This view might seem akin to a Law-as-Integrity theory.¹⁴³ However, close analysis yields the conclusion that the coherence model of law would support rather than undermine state recognition of same-sex marriages.

Finnis points out that sodomitical acts have not been recognized in law as consummating a marriage.¹⁴⁴ He seems to be suggesting that it would be inappropriate for the state to recognize same-sex marriages, because sodomitical relations are not viewed as consummating the marriage and same-sex couples would presumably be engaging in sodomitical relations.¹⁴⁵ Such an argument is unpersuasive. Were

138. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

139. *Id.* at 96.

140. *See Baehr v. Lewin*, 852 P.2d 44, 55 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

141. *See generally* Strasser, *supra* note 136, at 951-76 (discussing the importance of the right to marry and why marrying a same-sex partner should be included within this right).

142. *See infra* notes 144-48 and accompanying text.

143. *See generally* RONALD DWORKIN, *LAW’S EMPIRE* (1986) (discussing Law-as-Integrity theory).

144. Finnis, *supra* note 46, at 1068.

145. *See id.*

same-sex unions legally recognized, it seems likely that the law would be changed so that sodomitical relations might in fact be viewed as consummating the marriage. Even if such a change would not occur, Finnis's observation still does not have the import that he suggests. For example, individuals who have married and who have only had sodomitical relations or who have never had sexual relations of any sort will remain married until the marriage is challenged and is held void by a court.¹⁴⁶ Thus, the ability or desire to have intercourse is neither necessary for getting married nor for having the marriage recognized by the state. Not all states have recognized impotence, much less sterility, as a ground for annulling a marriage,¹⁴⁷ although the advent of no-fault divorce may have made such an issue less important. A further point which undermines Finnis's analysis is that, as various courts have recognized, marital sodomy is protected by the right to privacy.¹⁴⁸ Thus, Finnis's analysis notwithstanding, the law recognizes that sodomitical relations fall within the right to privacy for married individuals and thus there would be no lack of coherence in the law were the state to legally recognize same-sex unions.

The fact that many states permit marriages to be annulled for non-consummation¹⁴⁹ does not suggest that the ability or desire to have

146. See *Woods v. Woods*, 638 S.W.2d 403, 405 (Tenn. Ct. App. 1982) (finding that lack of consummation made marriage voidable rather than void).

147. See *Linneman v. Linneman*, 116 N.E.2d 182, 185-86 (Ill. App. Ct. 1953) (refusing to recognize impotence as ground for annulment).

148. See *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976) ("We may thus assume that the marital intimacies shared by the Lovisis when alone and in their own bedroom are within their protected right of privacy."); *Cotner v. Henry*, 394 F.2d 873, 875 (7th Cir. 1968) ("Indiana courts could not interpret the [Indiana sodomy] statute constitutionally as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy."); *State v. Lair*, 301 A.2d 748, 753 (N.J. 1973) (finding that sodomy statute has marital exception); *State v. Santos*, 413 A.2d 58, 66-68 (R.I. 1980) (implying that right of privacy would protect marital sodomy); see also *Bowers v. Hardwick*, 478 U.S. 186, 218 (1986) (Stevens, J., dissenting) ("[O]ur prior cases thus establish that a State may not prohibit sodomy within the sacred precincts of marital bedrooms.") (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

149. See ALASKA STAT. § 25.24.030(5) (Michie 1996) (marriage voidable for failure to consummate the marriage at the time of the marriage and continuing at the time of the commencement of the action); CAL. FAM CODE § 2210(f) (West 1994) (marriage voidable if either party impotent at time of marriage and that incapacity continues and appears to be incurable); DEL. CODE ANN. tit. 13 § 1506(2) (1993) (marriage voidable if, unbeknownst to party at the time of the marriage, the other party lacked physical capacity to consummate marriage); IDAHO CODE § 32-501(6) (1996) (marriage voidable if either party at time of marriage was physically incapable of entering into married state and incapacity continues and appears to be incurable); IOWA CODE ANN. § 598.29(2) (West 1996) (marriage voidable if either party impotent at time of marriage); MICH. COMP. LAWS ANN. § 552.39 (West 1988) (action to annul for physical incapacity must be commenced within two years of solemnization of marriage); MINN. STAT. ANN. § 518.02(b) (West 1990) (marriage voidable if, unbeknownst to party at time of the marriage,

sexual relations, much less a particular kind of sexual relations, is necessary for marriage, but merely that the state recognizes that sexual intimacy is an important element of marriage for many individuals. Individuals may reasonably expect that their marital partners will be willing to have sexual relations, although of course the courts will not be setting a standard with respect to how frequently such relations must take place, e.g., daily, weekly, monthly, annually, etc.

Suppose that two individuals marry and unbeknown to one of the parties the other party is either unable or unwilling to have sexual relations. This might be viewed as a matter of fraud because, absent reason to think otherwise,¹⁵⁰ each of the parties might reasonably assume that the other would be willing to have sexual relations.¹⁵¹ Yet, even in a case where there has been fraud, the marriage would have been made voidable rather than void.¹⁵² If each member of the couple was satisfied with the marriage, lack of sexual relations notwithstanding, then the marriage would continue to be recognized by the state.¹⁵³ Ironically, Finnis's discussion of how the state treats marriage and sodomitical relations *supports* the state's recognizing

other party lacked physical capacity to consummate marriage); N.J. STAT. ANN. § 2A:34-1(c) (West 1997) (same); N.Y. DOM. REL. LAW § 7(3) (McKinney 1988) (marriage voidable if either party incapable of entering into married state from physical cause); N.D. CENT. CODE § 14-04-01(6) (1997) (either party at time of marriage physically incapable of entering into married state, and incapacity continues and is incurable); OHIO REV. CODE ANN. § 3105.31(F) (Anderson 1996) (marriage may be annulled if never consummated); VT. STAT. ANN. tit. 15, § 515 (1989) (action to annul for physical incapacity must be commenced within two years of solemnization); W. VA. CODE § 48-2-2(a)(3)(C) (1996) (at time of marriage, one of parties because of natural or incurable impotency incapable of entering into marriage state); WIS. STAT. ANN. § 767.03(2) (West 1993) (unbeknownst to other party at time of marriage, one party lacked capacity to consummate); WYO. STAT. ANN. § 20-2-101(f) (Michie 1997) (action to annul for physical incapacity must be commenced within two years of solemnization).

150. See *Jarzem v. Bierhaus*, 415 So. 2d 88, 90 (Fla. Dist. Ct. App. 1982) ("[I]f the wife's claim for annulment or divorce had been based upon the fact that the husband was impotent, it would have been unavailing if she had knowledge of such a fact before the marriage.").

151. See *Marriage of Liu v. Liu*, 242 Cal. Rptr. 649, 656 (Ct. App. 1987) ("An annulment may be had for fraud where a wife harbors a secret intention at the time of the marriage not to engage in sexual relations with her husband.") (citing *Handley v. Handley*, 3 Cal. Rptr. 910, 912 (Ct. App. 1960)).

152. See *Tyson v. State*, 90 So. 622, 623 (Fla. 1922). The Florida Supreme Court stated:

The general rule, supported by the great weight of authority and which we regard as sound in principle, is to the effect that a marriage procured by fraud or while one of the parties thereto is actually under legal duress is voidable only, and therefore valid and binding upon the parties until annulled by a court of competent jurisdiction.

Id. (citing *Hawkins v. Hawkins*, 38 So. 640, 641 (Ala. 1905)).

153. In *Jarzem*, the marriage was dissolved, not because the husband and wife were not having sexual relations, but because he was having relations with someone else outside of the marriage. 415 So. 2d at 90. Had he been having sexual relations with no one, the marriage would not have been voidable. See *id.*

same-sex marriages, since the state recognizes "nonconsummated" marriages as long as the parties themselves do not object.

D. The Production and Raising of Children

Even if the law's treatment of sodomy and the conditions under which marriages will be viewed as valid would pose no difficulty for the state's recognizing same-sex marriages, it might seem that an obvious and important point has been omitted in the above analysis, namely that same-sex couples (allegedly) cannot fulfill the purpose of marriage. Consider the argument against same-sex marriage which has often been articulated and which seems to represent an instrumentalist Natural Law view of marriage, namely, that marriage is for the production of children and that same-sex couples should be precluded from marrying because they are unable to have children through their union.

One response is that same-sex couples do have children.¹⁵⁴ However, suppose that were not so. Even if one brackets that same-sex couples are raising children, there is an additional difficulty posed by the purpose-of-marriage argument. The theorists and courts offering this argument either ignore or downplay the importance of the state's not requiring either an ability or a willingness to have children when opposite-sex couples wish to marry.

One court addressing the "problem" posed by infertile, opposite-sex couples who nonetheless wished to marry suggested that the reason that it was permissible for them but not for same-sex couples to marry was that privacy issues would be implicated in the attempt to find out whether the opposite-sex couple could produce a child through their union, whereas no such issues would be involved when a same-sex couple was being considered.¹⁵⁵ Yet, two opposite-sex individuals who publicly volunteered that they were unable to procreate could not be precluded on that account from marrying, notwithstanding their having obviated the privacy issue alluded to by the court. Further, and what is especially interesting for purposes here, the current policies of some states with respect to the marriages of first cousins establishes that these states have rejected that this instrumentalist Natural Law view underlies their domestic relations jurisprudence.

Some states prohibit individuals from marrying their first cousins and will not recognize such marriages even if validly celebrated in an-

154. See *supra* notes 133-36 and accompanying text.

155. *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980).

other jurisdiction.¹⁵⁶ Other states, like Ohio, will not allow such marriages to be performed in the state but will recognize them if validly celebrated elsewhere.¹⁵⁷ For purposes here, the most interesting laws are found in a different group of states. These states have said that first cousins can marry only if they are over a certain age, e.g., sixty-five, or are able to establish that at least one of them cannot reproduce.¹⁵⁸

These states are allowing these marriages only if the couple *cannot* reproduce through their union. Further, they do not require that the individuals be accidentally or naturally sterile—their concern is that the couple not be able to produce a child through their union. The privacy claim which allegedly obviates the need to find out whether opposite-sex couples can reproduce is simply not an issue here. Indeed, these couples must affirmatively establish that they cannot produce a child through their union if they wish to marry. Thus, the claim that marriage is predicated on the ability and willingness of couples to procreate is not simply false, but is directly contrary to existing state law.

III. CONCLUSION

The claim that Natural Law_M prohibits same-sex marriage is deceptive, if not false. The most that can be claimed is that *some* Natural Law moral theories condemn same-sex relations, although even those theories may include justifications which as readily support as undermine the moral permissibility of same-sex marriages.

The state clearly has an interest in providing a stable setting for the production and raising of children and the institution of marriage may help to promote that interest. Yet, marriages have other purposes as well, and even were that the only purpose, recognizing same-sex marriages would promote rather than undermine that legitimate, significant state interest, because gay and lesbian couples do have and raise children.

Both the intrinsic and extrinsic Natural Law_M arguments against the state recognition of same-sex marriage are unconvincing. Further, the

156. See *Estate of Mortenson v. Mortenson*, 316 P.2d 1106, 1107 (Ariz. 1957).

157. See *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208-09 (Ohio 1958).

158. See ARIZ. REV. STAT. ANN. § 25-101(B) (West Supp. 1997) (at least 65 or one is unable to reproduce); 750 ILL. COMP. STAT. ANN. 5/212(4) (West 1996) (at least 50 or either party permanently and irreversibly sterile); IND. CODE ANN. § 31-11-1-2 (Michie 1997) (at least 65); UTAH CODE ANN. § 30-1-1 (Supp. 1997) (at least 65 or both at least 55 and one cannot reproduce); WIS. STAT. ANN. (West 1993) § 765.03 (female 55 or either submits affidavit that party is permanently sterile).

state has a variety of interests, not even addressed in those critiques, which would all be served by recognizing same-sex marriages. Finally, since many of the individual interests promoted in opposite-sex marriages are also promoted in same-sex marriages, there seems to be an overwhelming number of reasons for the state to recognize those unions.

There is no small irony in the claim that Natural Law requires that same-sex marriages not be recognized, especially if one considers this a claim about what Natural Law_L requires. When Professor Lon Fuller offered reasons to think that it would be advantageous to require that law be connected to morality in an essential way, he suggested that such a requirement would be especially beneficial for minorities.¹⁵⁹ He offered a thought experiment to establish his point.

Fuller imagined that he had been "transported to a country where [his] beliefs were anathemas."¹⁶⁰ He suggested that there might be "reason to fear that the law might be covertly manipulated to [his] disadvantage," although he doubted that he "would be apprehensive that its injunctions would be set aside by an appeal to a morality higher than law."¹⁶¹ He was thus suggesting that moral claims would not be used to bolster unfair treatment of minorities.

Indeed, Fuller was willing to take his argument a step further, since he was confident that if he as a member of a minority group "felt that the law itself was [his] safest refuge, . . . it . . . [would] be because even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law."¹⁶² He believed that such a hesitancy would itself derive, "not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable."¹⁶³ He was thus suggesting that the allegedly necessary connection between law and morality would provide a bulwark against biased treatment of minorities.

Yet, some of the obvious demands of morality, e.g., that individuals should be treated equally and should have their fundamental interests respected absent countervailing, noninvidious, compelling state interests, are ignored in discussions of whether same-sex couples should be allowed to marry. Certainly, moral arguments are sometimes used to secure the law's treating minorities in a fairer way and further it is not

159. See Fuller, *supra* note 10, at 637.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

hard to imagine other commentators using specious nonmoral reasons to establish, for example, that same-sex couples should be denied the right to marry. Thus, it is not suggested here that positing a necessary connection between law and morality will result in minorities' receiving worse treatment. Rather, it is suggested that the Natural Law_L position provides no guarantee that minorities will be treated any better than they would be treated in a legal positivist system.

The Natural Law arguments offered to establish that same-sex marriages should not be legally recognized help illustrate why casuistic reasoning has come to have such a pejorative connotation. Not only do the arguments as readily establish that such unions should be legally recognized as that they should not be, but the commentators offering the various claims seem oblivious to the implications of the very arguments that have been offered. Further, these theorists ignore the numerous moral and legal reasons for states to recognize same-sex unions. The reality that many if not most states will not recognize such unions, absent court order, has more to do with a current acceptance of second-class citizenship for a whole class of individuals¹⁶⁴ than with the kinds of reasons traditionally offered to refuse to recognize such marriages.

164. See Joseph Raz, *Liberty and Trust*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 113, 126 (Robert P. George ed., 1996) (discussing various manifestations of bigotry which "condemn gay men and lesbians to second class status in their own society").

